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NO.

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IN THE

Supreme Court of the United States

October Term, 1984

HAYDEN B. RENWICK,

Petitioner,

v.

THE NEWS AND OBSERVER PUBLISHING COMPANY, d/b/a THE RALEIGH TIMES and GREENSBORO NEWS COMPANY, d/b/a THE GREENSBORO DAILY NEWS AND RECORD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

(1) WHETHFR A CITIZEN FORFEITS AN INTEREST PROTECTED BY THE FIRST AND SEVENTH AMENDMENTS OF THE UNITED STATES CONSTI-TUTION, THAT IS, THE INTEREST TO PLEAD AND DISPROVE A PUBLISHED FALSEHOOD BEFORE A JURY, WHERE, AS HERE, DEFENDANTS HAVE PUBLISHED OR REPUBLISHED FALSE FACTUAL STATEMENTS REASONABLY SUSCEPTIBLE OF A DEFAMATORY MEANING AND WHICH, BY JUDGE ALONE, HAVE BEEN DETERMINED NOT TO BE LIBELOUS.

(2) WHETHER A PLAINTIFF INJURED IN HIS REPUTATION, PRO - FESSIONAL STANDING, OR IS OTHER-WISE SHAMED OR RIDICULED HAS A LEGALLY PROTECTED INTEREST

UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO PROSECUTE A CLAIM AGAINST ANOTHER WHERE DEFENDANT GIVES PUBLICITY TO A MATTER CONCERNING PLAINTIFF THAT PLACES PLAINTIFF BEFORE THE PUBLIC IN A FALSE LIGHT BY THE UTTERANCE OF A MISREPRESENTATION OF A PERSON'S STATEMENTS,CHARACTER, HISTORY, ACTIVITIES OR BELIEFS: AND DENIES PLAINTIFF DUE PROCESS, AS HERE, WHERE HIS CLAIM HAS BEEN DISMISSED.

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Renwick v. News and Observer Publishing Company, 312 S.E. 2d 405(N.C. 1984).

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Varnish v. Best Medium Publishing Co., 405 F. 2d 608(2d Cir. 1968), cert. denied, 394 U.S. 987, 22 L. Ed. 2d 762, 89 S. Ct. 1465, reh. denied, 395 U.S. 930, 23 L. Ed. 2d 251, 89 S. Ct. 1769(1969).

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OTHER AUTHORITIES:

Eaton, The American Law of Defamation Through Gertz v. Robert Welch and Beyond, 61 Va. L. Rev. 1349(1975)

5 Restatement Torts (Second), Section 652(Appendix)

CONSTITUTIONAL PROVISIONS:

First Amendment

Seventh Amendment

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HAYDEN B. RENWICK,
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THE NEWS AND OBSERVER PUBLISHING COMPANY, d/b/a THE RALEIGH TIMES, and GREENSBORO NEWS COMPANY, d/b/a THE GREENSBORO DAILY NEWS AND RECORD,
Respondents.

On Writ Of Certiorari To The Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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1. OPINIONS BELOW

The opinion of the North Carolina Court of Appeals, at caption number 8215SC 432(304 S.E. 2d 593, 63 N.C. App. 200(1983)), was entered on July

5, 1983, and is attached as Exhibit A in the Supplemental Appendix. The opinion of the Supreme Court of North Carolina, at caption number 412A83 (312 S.E. 2d 405, 310 N.C. 312 (1984)), was entered on March 6, 1984, and is attached as Exhibit B in the Supplemental Appendix. The Order of the Supreme Court of North Carolina denying plaintiff's Petition for Rehearing, was entered on April 30, 1984, and is attached as Exhibit C in the Supplemental Appendix.

2. JURISDICTION

The order dismissing the petitioner's complaints was entered on March 3, 1982 by Judge John Martin in the Superior Court of Orange County, North Carolina, and

was reversed by the North Carolina Court of Appeals on July 5, 1983. The decision of the North Carolina Court of Appeals was reversed by the Supreme Court of North Carolina on March 6, 1984, and an Order was entered by the Supreme Court of North Carolina denying plaintiff's Petition for Rehearing on April 30, 1984. The jurisdiction of this Court to review the decision of the Supreme Court of North Carolina is conferred by Title 28, United States Code, Section 1257(3).

3. QUESTIONS PRESENTED FOR REVIEW

(1) WHETHER A CITIZEN FORFEITS AN INTEREST PROTECTED BY THE FIRST AND SEVENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THAT IS, THE INTEREST TO PLEAD

AND DISPROVE A PUBLISHED FALSEHOOD BEFORE A JURY, WHERE, AS HERE, DEFENDANTS HAVE PUBLISHED OR REPUBLISHED FALSE FACTUAL STATEMENTS REASONABLY SUSCEPTIBLE OF A DEFAMATORY MEANING AND WHICH, BY JUDGE ALONE, HAVE BEEN DETERMINED NOT TO BE LIBELOUS.

(2) WHETHER A PLAINTIFF INJURED IN HIS REPUTATION, PROFESSIONAL STANDING, OR IS OTHERWISE SHAMED OR RIDICULED HAS A LEGALLY PROTECTED INTEREST UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO PROSECUTE A CLAIM AGAINST ANOTHER WHERE DEFENDANT GIVES PUBLICITY TO A MATTER CONCERNING PLAINTIFF THAT PLACES PLAINTIFF BEFORE THE PUBLIC IN

A FALSE LIGHT BY THE UTTERANCE OF A MISREPRESENTATION OF A PERSON'S STATEMENTS, CHARACTER, HISTORY, ACTIVITIES OR BELIEFS; AND DENIES PLAINTIFF DUE PROCESS, AS HERE, WHERE HIS CLAIM HAS BEEN DISMISSED.

4. CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the First Amendment to the United States Constitution which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The case also involves the Seventh Amendment to the United States Constitution which states:

> In suits at common law, where the value in controversy shall

> exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

5. STATEMENT OF CASE

The petitioner, Hayden B. Renwick, filed this action against the respondents, The News and Observer Publishing Company and the Greensboro News Company on October 26, 1981 for libel and invasion of privacy. In his complaint, he alleged that the News and Observer Publishing Company had published an editorial which made false statements about him which gave the impression that he is an extremist, a liar and is irresponsible in his profession, that the publication was libelous, and that the false statements were published

negligently and with actual malice. He further alleged that the publication of these false statements placed him in a false light before the public and thereby invaded his privacy. In a separate action against the Greensboro News Company, he alleged that it republished the editorial in the Raleigh Times. The same allegations that the statements about him were false and libelous, and that they were published negligently and with actual malice were made.

The respondents' Motion to Dismiss under Rule 12(b)(6) of the Rules of Civil Procedure was granted on February 22, 1982, and the North Carolina Court of Appeals in a 2-1 decision on July 5, 1983 reversed and found the editorials to be

libelous and capable of a defamatory meaning, an invasion of petitioner's right to privacy and not protected by the First Amendment. In a 4-3 decision, the North Carolina Court of Appeals was reversed by the Supreme Court of North Carolina on March 6, 1984. It is from that decision that Hayden B. Renwick petitions this Court for a Writ of Certiorari.

I. A CITIZEN FORFEITS AN INTEREST PROTECTED BY THE FIRST AND SEVENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THAT IS, THE INTEREST TO PLEAD AND DISPROVE A PUBLISHED FALSEHOOD BEFORE A JURY, WHERE, AS HERE, DEFENDANTS HAVE PUBLISHED OR REPUBLISHED FALSE FACTUAL STATEMENTS REASONABLY SUSCEPTIBLE OF A DEFAMATORY MEANING AND WHICH, BY JUDGE ALONE, HAVE BEEN DETERMINED NOT TO BE LIBELOUS.

A. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE SUPREME COURTS AND FEDERAL COURTS OF APPEALS ON THE ISSUE PRESENTED.

In Renwick v. News and Observer Publishing Company, 312 S.E. 2d 405(N.C. 1984), the North Carolina Supreme Court indicated that in determing whether a publication is libelous per se, the Court has the initial responsibility of deciding whether the publication is subject to one interpretation and whether

the publication is defamatory. The Court held that it is only after the trial Court has decided that the answer to both of these questions is affirmative that such cases should be submitted to the jury on the theory of libel per se. Id. at p. 409.

This is in substantial conflict with the Supreme Courts of other states and with federal courts of appeals. In essence, the North Carolina Supreme Court is upholding the trial judge's right to determine the threshold issue of liability, i.e. whether the publication is libelous, and to only submit that issue to the jury when the Court has made its initial determination of liability. This substantially deprives the plaintiff of his Seventh

Amendment right to a jury on the central issue of liability, whether the publication is or is not libelous.

In Hartzog v. United Press Ass'ns., 202 F. 2d 81(4th Cir. 1953), the United States Court of Appeals for the Fourth Circuit was faced with the issue presented in this case. In that case, the defendant allegedly falsely reported that the plaintiff had been forcibly ejected from a political party executive committee meeting by the police. In holding that the trial judge erred in directing a verdict for the defendant, the Court stated at p. 83:

> We think this question was one for the jury to decide, on proper instructions from the court. It was, as a matter of fact, a question within the province of the jury to decide whether the

> statements in question - to the effect that plaintiff was forcibly ejected (or forcibly kicked out) from the meeting of the Committee by police called by Committeeman Gerald - were or were not defamatory and actionable as tending to reduce plaintiff's character or reputation, to render him odious, contemptible or ridiculous, or diminish his reputation in his profession. We cannot say, as a matter of law, that the publications in question did not tend to bring about at least one of these effects.

Similarly, the United States Court of Appeals for the District of Columbia has recognized the jury's right to decide the threshold issue of whether a publication is libelous. In Olinger v. American Savings and Loan Association, 409 F. 2d 142(D.C. App. 1969), the Court stressed at p. 144:

> The statement in question contains two charges: (1) that appellant was unwilling to permit his former wife to sell the house, and (2) that he was not keeping

> the payments current on the first and second trusts. It is apparent that both charges are at least capable of a defamatory meaning. It is for the jury to determine whether the statement was so understood by recipients of the letter and whether the charges are, in fact, true. Since these are genuine issues of material fact, we remand for further proceedings not inconsistent with this opinion.

The United States Court of Appeals for the Third Circuit in Skeoch v. Ottley, 377 F. 2d 804 (3rd Cir., 1967) noted at p. 809:

> We take this to mean that a court should not take unto itself the task of deciding the 'most natural' meaning of words, so long as another interpretation, 'under all the circumstances', is within the bounds of reason.

Furthermore, in Dimiceli v. Klieger, 58 Wis. 2d 359, 206 N.W. 2d 184(Sup. Ct. Wis. 1973) the Wisconsin Supreme Court emphasized the right of the jury to determine the

threshold issue of libel instead of the trial judge at pp. 186-187:

> In this state and elsewhere, a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or delaing with him. The test is whether the communication is capable of such meaning. If reasonable men might differ as to whether a communication is defamatory, the question is for the jury.

In sum, the decision of the North Carolina Supreme Court in Renwick in which the Court precluded the jury from deciding the threshold issue of whether the editorial in question was libelous is in conflict with decisions of other state supreme courts and federal courts of appeals which have recognized the right of the jury to pass upon this threshold

issue of liability.

B. THE DECISION INVOLVES IMPORTANT ISSUES OF FEDERAL CONSTITUTIONAL LAW.

The Seventh Amendment to the United States Constitution insures that a case will not be taken away from the jury where evidence is conflicting or different conclusions may be drawn from undisputed facts. Woodward v. Atlantic C. L. R., 57 F. 2d 1019(5th Cir., 1932). Furthermore, the First Amendment to the United States Constitution has as an underlying interest in protecting a citizen's right to be free from false speech which attacks one's reputation. Eaton, The American Law of Defamation Through Gertz v. Robert Welch and Beyond, 61 Va. L. Rev. 1349(1975).

The underlying reason for the conflicts between courts on the issue presented here is that some courts have still held fast to archaic distinctions or classes of libel, such as libel per se and libel per quod. The Supreme Court of Tennessee came to grips with this issue in Memphis Publishing Co. v. Nichols, 569 S.W. 2d 412(Tenn., 1978) at pp. 418-419:

> Under the common law as applied in this state prior to the Gertz decision, defamations were classified as either actionable per se or per quod. The primary distinction between libel per se and libel per quod lay in the nineteenth-century development requiring special damages to be plead and proved in libel actions unless the defamatory meaning of the words was apparent on their face.

The Court concluded at p. 419:

> Since Gertz has held that presumed damages are no longer premissible, the per se/per quod distinction no longer has any practical meaning. "A uniform requirement for proof of actual damages obliterates these often illogical distinctions, most of them relics from centuries past. We hold, therefore, that the per se/per quod distinction is no longer a viable one. The plaintiff must plead and prove injury from the alleged defamatory words, whether their defamatory meaning be obvious or not.

In Eaton, 61 Va. L. Rev. 1349 (1975), supra at p. 1355, the archiac nature of these libel classifications was noted:

> Under English common law, all libel was actionable without proof of special damages, whether defamatory on its fact or not. The terms "libel per se" and "libel per quod" were originally used only to differentiate the two kinds of statements for purposes of required allegations in the pleadings.

> The addition of a special damage requirement to the latter category apparently began as a confusion with the "actionable per se" terminology in the law of slander, but has been repeated so often that it appears to be no longer assailable as a mere technical error. (Footnote 21)

Furthermore, Eaton, supra.

points out at p. 1356:

> The requirement of proof of pecuniary damages apparently developed from an ancient jurisdictional dispute between the ecclesiastical courts and the common law courts and makes little sense in contemporary terms. But judges have seized this vehicle and converted it into a device to provide greater protection for publishers in ambiguous situations, and to aid in the elimination of trifling claims against both publishers and speakers, notwithstanding the illogic of its application for this purpose.

The major constitutional issue

presented to this Court is whether

the decision in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789(1974) rendered the archaic classifications of libel per and libel per quod invalid. If so, then the issue of whether a publication is capable of a defamation meaning would be a question for the jury. A judge could only dismiss a case on the pleadings if the publication was not susceptible of a defamatory meaning as a matter of law.

In Gertz, supra. at p. 811, this Court stated that it was attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It rejected

the traditional state tort classification of libel per se, which had historically presumed damages from the publication of words which were libelous per se. Therefore, we contend that the logical extension or interpretation in Gertz is that the per se/per quod distinction no longer has any practical meaning. If the jury could reasonably conclude that an article was capable of a defamatory meaning, then the First and Seventh Amendments to the United States Constitution would guarantee the right of the jury to rule on the threshold issue of liability. This is especially significant in light of Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456(1967). In that case, this

Court recognized that the article published in Life magazine was capable of several interpretations. This Court noted that it was for the jury and not the Court to determine whether there was knowing or reckless falsehood. Id. at Footnote 11 at p. 470.

The First and Seventh Amendment issue presented here is one of the few major issues in libel litigation which have not been addressed by this Court. These archaic classifications are being confronted by litigants in most libel cases in this country, and have had the effect as with the instant case of denying citizens their constitutional right to a jury trial. This issue is of major significance in light of Gertz, supra. and Time, Inc., supra. This

Court has an important interest in reconciling the archaic libel classifications with the competing interests grounded in the First and Seventh Amendments after the Gertz and Time, Inc. decisions. That interest is in protecting the individual's right to be free from false and defamatory speech which injures one's reputation and the right to have the jury decide whether a publication is reasonably susceptible of a defamatory meaning.

II. A PLAINTIFF INJURED IN HIS REPUTATION, PROFESSIONAL STANDING, OR IS OTHERWISE SHAMED OR RIDICULED HAS A LEGALLY PROTECTED INTEREST UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO PROSECUTE A CLAIM AGAINST ANOTHER WHERE DEFENDANT GIVES PUBLICITY TO A MATTER CONCERNING PLAINTIFF THAT PLACES PLAINTIFF BEFORE THE PUBLIC IN A FALSE LIGHT BY THE UTTERANCE OF A MISREPRESENTATION OF A PERSON'S STATEMENTS,

CHARACTER, HISTORY, ACTIVITIES OR BELIEFS; AND DENIES PLAINTIFF DUE PROCESS, AS HERE, WHERE HIS CLAIM HAS BEEN DISMISSED.

A. THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA IN THE PRESENT CASE CONFLICTS WITH THE DECISIONS OF OTHER STATE SUPREME COURTS AND FEDERAL COURTS OF APPEALS ON THE ISSUE PRESENTED ABOVE.

In the case at bar, Renwick v. News and Observer Pub. Co., supra., the Supreme Court of North Carolina failed to recognize the theory of false light invasion of privacy based on constitutional grounds. The majority stated:

> Given the First Amendment limitations placed upon defamation actions by Sullivan and upon false light invasion of privacy actions by Hill, we think that such additional remedies as we might be required to make

> available to plaintiffs should we recognize false light invasion of privacy claims are not sufficient to justify the recognition in this jurisdiction of such inherently constitutionally suspect claims for relief. 312 S.E. 2d at 413.

The North Carolina Supreme Court has long recognized a cause of action for invasion of privacy. Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938). In fact, three-fourths of all the states have judicially recognized a cause of action for invasion of privacy. Goodrich v. Waterbury Republican American, Inc., 188 Conn. 197, 448 A. 2d 1317 (1982); 5 Restatement Torts (Second), Section 652 (Appendix). Only two state supreme courts that have considered the issue have refused to recognize a cause of action for invasion of privacy and those courts have con-

cluded that the issue was more properly one for legislative determination. Kelian v. People Acting Through Community Effort, Inc., 408 A. 2d 608, 609 (R.I. 1979); Brunson v. Ranks Army Store, 161 Neb. 519, 525, 73 N.W. 2d 803(1955).

North Carolina is the only state to recognize a cause of action for invasion of privacy and yet reject the false light doctrine on constitutional grounds. Other state and federal courts that have adopted the false light doctrine have not found any inherent tension between that doctrine and the First Amendment since each action protects different interests. Privacy actions involve injuries to emotions and mental

suffering, while defamation actions involve injury to reputation. Rinsley v. Brandt, 446 F. Supp. 850, 858(D. Kan. 1977); Froelich v. Adair, 213 Kan. 357, 516 P. 2d 993 (1973). This Court also made this distinction in Time, Inc. v. Hill, 385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534 at footnote 9(1967). Thus, most jurisdictions have allowed causes of action for invasion of privacy and defamation to be pleaded together. Miller v. News Syndicate Co., 445 F. 2d 356, 357(2d Cir. 1971); Varnish v. Best Medium Publishing Co., 405 F. 2d 608(2d Cir. 1968), cert. denied, 394 U.S. 987, 22 L. Ed. 2d 762, 89 S. Ct. 1465, reh. denied, 395 U.S. 930, 23 L. Ed. 2d 251, 89 S. Ct. 1769(1969).

B. THIS CASE PRESENTS A QUESTION OF MAJOR IMPORTANCE FOR THIS COURT.

In Time, Inc. v. Hill, supra. at 389, this Court held that constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function. This is so because the calculated falsehood enjoys no constitutional immunity in false light invasion of privacy cases. Id. at 390. This Court, in Time, Inc. v. Hill, supra. found no great tension between the First Amendment and false light invasion of privacy.

In Cantrell v. Forest City Pub. Co., 419 U.S. 245, 42 L. Ed. 2d 419, 95 S. Ct. 465(1974), this Court, in

reversing the judgment of the Court of Appeals and reinstating a judgment against a newspaper and a staff writer for false light invasion of privacy, also disallowed First Amendment protection for "calculated falsehoods." Again, this court in no way found that the false light doctrine was inherently constitutionally suspect, as did the majority of the North Carolina Supreme Court in Renwick.

Clearly, the dissenting opinion in Renwick concerning the "false light" theory by Justice Meyer was correct, when he stated:

> I do not share the majority's fear of conflict between our recognition of a false light invasion of privacy cause of action and the First Amendment limitations placed upon

> defamation actions by Sullivan and upon false light invasion of privacy actions by Hill -- The First Amendment provides no absolute protection for any individual or member of the news media to make false material statements of fact and then to draw defamatory conclusions therefrom. 312 S.E. 2d at 416.

The Court should accept plaintiff's Petition for Certiorari in this case to decide whether there is such tension between the Free Speech Clause of the First Amendment and false light invasion of privacy to such an extent that the false light theory cannot exist based on constitutional grounds. Moreover, this Court should grant the Petition for Certiorari in this case to spell out whether if the false light theory is not constitutionally suspect, the constitutional standard enunciated in Time, Inc. v. Hill applies to all false-light

cases or whether the constitutional standard announced in Gertz for libel actions should also apply to false light invasion of privacy actions. This Court left this question open for another day in Cantrell. Now is the time for this Court to decide this important issue. The decision of the majority of the North Carolina Supreme Court in the case at bar with regards to false light invasion of privacy was not only in conflict with the supreme courts of other states and with federal courts of appeals. It was also clearly erroneous. Plaintiff, Hayden B. Renwick, was denied his right to due process when his false light invasion of privacy claim was

dismissed on constitutional grounds.

CONCLUSION

Based upon the above-mentioned reasons petitioner, Hayden B. Renwick ask this Court to grant his Petition for Certiorari.

This 30th day of July, 1984.

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